

## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

## BEFORE THE ADMINISTRATOR

|                              |   |                            |
|------------------------------|---|----------------------------|
| In the Matter of             | ) |                            |
|                              | ) |                            |
| Everwood Treatment Co., Inc. | ) | Docket No. RCRA-IV-92-15-R |
| and Cary W. Thigpen,         | ) |                            |
|                              | ) |                            |
| Respondents                  | ) |                            |

ORDER ON DISCOVERY

This order addresses the Amended Motion For Discovery filed by Everwood under date of May 17, 1993, which seeks an order requiring Complainant to answer interrogatories and produce documents. The motion recited, inter alia, that it was made pursuant to 40 CFR § 22.19, that the requested discovery would not delay the hearing,<sup>1/</sup> that the information was not otherwise obtainable and had significant probative value.

Complainant filed a response on June 25, 1993, opposing the motion upon the ground it was premature,<sup>2/</sup> that it was burdensome and unnecessary, that it sought information protected by the deliberative process, attorney-client and work product privileges, that it was overly broad and represented a fishing expedition, that certain of the requests were moot in that the information was or

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<sup>1/</sup> The hearing was initially scheduled to commence on August 10, 1993, but has since been rescheduled to commence on September 7, 1993.

<sup>2/</sup> This contention was based on Complainant's pending motion to amend its complaint. This motion was denied by an order, dated July 28, 1993.

would be included in Complainant's pre-hearing exchange or supplements thereto and lastly, that discovery should be reciprocal, i.e., if Complainant is ordered to supply information requested by Everwood, Everwood should be directed to answer similar requests submitted by Complainant.<sup>3/</sup>

Specific requests and rulings thereon follow:

1. This interrogatory seeks the name, address, telephone number and place of employment of each person whom to Complainant's knowledge, information and belief has knowledge of the facts and circumstances upon which EPA bases its Complaint and Proposed Compliance Order in Docket No. 92-15-R.

RULING:

This interrogatory seeks to identify individuals having knowledge of the facts alleged in the complaint of whom Complainant is aware, but whom it has elected not to call as witnesses. Complainant will be directed to comply with this interrogatory to the extent it has knowledge of any such individuals having personal knowledge of the incidents described in the complaint who have not been identified in its pre-hearing exchange.

2. This interrogatory seeks the identity of any agent or employee of EPA, ADEM, the State of Alabama, or of the United States having a conversation with Cary W. Thigpen or agents or employees of Everwood in any way relating to the factual allegations of the complaint herein, the names, addresses and

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<sup>3/</sup> Complainant has not, however, filed a motion for discovery.

telephone numbers of each person present, the date and time of day of the conversation, the substance of the conversation and what employees of Everwood or of the government said.

RULING:

Although a plausible holding on this request might be that the information sought is otherwise obtainable from Mr. Thigpen or other officers or employees of Everwood, Everwood is entitled to verify if there were meetings or conversations with its officers or employees other than those referenced in the complaint, the identity of persons present and the substance of the conversations. This request will be granted to the foregoing extent as it may enable Everwood to discover possibly inconsistent or contradictory statements made at a point closer in time to the incidents giving rise to the complaint.

3. This interrogatory seeks to ascertain whether any agent, employee, or attorney of EPA or ADEM obtained, secured, or received any statement in any form from any person regarding the factual allegations in the complaint herein and, if so, when the statement was made, from whom obtained (name, address and telephone number) and the substance of the statement.

RULING:

While the substance of a statement as described above, if given to, or secured by, an attorney, may well be within the attorney-client/work product privilege, Complainant will be directed to comply with this interrogatory. If Complainant intends

to rely on the attorney-client/work product privilege, it must state with specificity its reasons for doing so.

4. This interrogatory seeks the names, addresses, phone numbers, and positions of all persons who participated in the proposed penalty evaluation, computation and decision.

RULING:

Complainant has not identified which of its numerous proposed witnesses will testify as to the calculation of the proposed penalty.<sup>4/</sup> Complainant has, however, supplied a copy of the civil penalty computation worksheet (pre-hearing exchange, Exh 40) and the RCRA Civil Penalty Policy is presumably available to Everwood. Complainant will be ordered to identify witnesses offered to support the penalty calculation.

5. This interrogatory seeks the complete name, address and telephone number of every person EPA expects to call as an expert witness in this action, the substance of the facts and opinions about which the expert is expected to testify and a summary of the basis of each opinion concerning which each expert is expected to testify.

RULING:

Complainant's response to the motion expressed confidence that this request along with Nos. 7 and 8 could be mooted by a reciprocal exchange with counsel for Everwood. There is no

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<sup>4/</sup> Rule 22.19(b) provides, inter alia, that, unless otherwise ordered by the ALJ, a brief narrative summary of a witnesses' proposed testimony will be included in a party's pre-hearing exchange.

indication, however, that such an exchange has been accomplished and this request will be granted.

6. This interrogatory seeks the complete name, address and telephone number of any experts consulted with regard to the allegations in the complaint herein, which Complainant does not expect to call as a witness.

RULING:

Relying on FRCP Rule 26(b), Complainant says that such information is discoverable only under exceptional circumstances, which are not present here. Although not binding, the FRCP and decisions interpreting the FRCP are useful guides in applying the Consolidated Rules of Practice.<sup>5/</sup> This request will be denied.

7. This request asks for a copy of any written reports, notes, computations, memoranda or documents whatsoever made by any expert proposing to testify listed in answers to these interrogatories.

RULING:

This is another request which EPA counsel stated would be mooted in a reciprocal exchange with Everwood. Because there is no indication the request has been mooted, it will be granted.

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<sup>5/</sup> It has been pointed out that Consolidated Rule 22.19(f), applicable to discovery, had its origins in the Rules of Practice Governing Hearings under section 6 of FIFRA, which were specifically intended to incorporate applicable FRCP discovery rules. In the matter of Safety-Kleen Corporation, Docket Nos. RCRA-1090-11-10-3008(a) and 11-11-3008(a), Order on Discovery (December 6, 1991).

8. This request asks for a complete CV on each person listed as an expert witness who is expected to testify in this action.

RULING:

This information should be readily available to Complainant and this request will be granted.

9. This request asks for a listing and description of all documentary, photographic, video, taped, demonstrative evidence, etc. upon which any witness expected to testify in this matter will rely in forming an expert opinion.

RULING:

While presumably most of this information is contained in Complainant's pre-hearing exchange, this request will be granted to the extent there is such evidence not so included.

10. This request asks for the identity by title, volume number, article name and page number of all professional technical literature or applicable EPA policy that EPA intends to rely upon to support any contention alleged in the Complaint and Proposed Compliance Order in Docket No. 92-15-R.

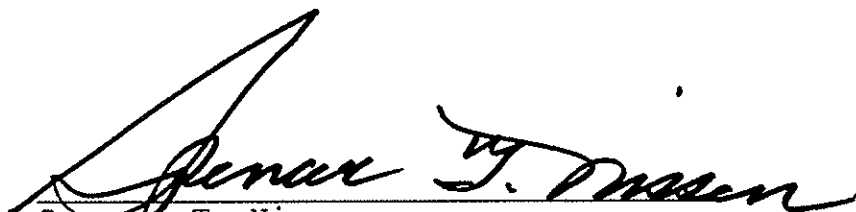
RULING:

Although most of this information should be contained in the complaint and in Complainant's pre-hearing exchange, this request will be granted to the extent the information is not so contained.

O R D E R

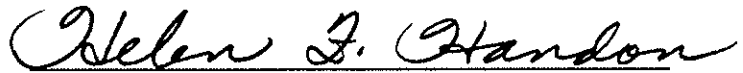
Everwood's Amended Motion for Discovery is granted to the extent indicated above. Complainant shall comply with this order not later than the pre-hearing conference scheduled immediately prior to the commencement of the hearing.

Dated this 31<sup>st</sup> day of August 1993.

  
Spencer T. Nissen  
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER ON DISCOVERY, dated August 31, 1993, in re: Everwood Treatment Company, Inc. and Cary W. Thigpen, Dkt. No. RCRA-IV-92-15-R, was mailed to the Regional Hearing Clerk, Reg. IV, and a copy was mailed to Respondent and Complainant (see list of addressees).



Helen F. Handon  
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DATE: August 31, 1993

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